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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 13, 1999

MM Doc. 94-149

BY HAND DELIVERY

The Honorable William E. Kennard
Chairman
Federal Communications Commission
Washington, D.C. 20554

Dear Chairman Kennard:

This letter is being filed on behalf of USA Broadcasting, Inc. ("USA Broadcasting") for your consideration in connection with the Commission's pending review of its rules regarding television ownership.

In previous written submissions and oral presentations, USA Broadcasting has urged the Commission to modify its rules in order to achieve the diversity-enhancing benefits that can result from weak station/strong station ownership combinations in the same DMA. Such combinations would enable stations that currently do not make a meaningful contribution to diversity in their markets to emerge as new, additional sources of local news, public affairs, sports and other programming. One approach suggested by USA Broadcasting would be the creation of an "underdeveloped station" exemption from the Television Contour Overlap ("Duopoly") Rule, 47 C.F.R. § 73.3555(b), in order to permit common ownership of attributable interests in two television stations under the following limited circumstances:

- The stations are located in one of the top-50 DMA television markets.
- At least one of the stations is a UHF station.
- At least one of the stations has a 5 percent or less share of either total market audience or advertising revenue at the time the interest is acquired.

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This letter and the attached revenue and cost data amplify the economic, competitive and legal bases for the use of an audience/revenue share benchmark in connection with such an "underdeveloped station" exemption. Indeed, USA Broadcasting's analysis demonstrates that, at a share level of less than even six percent, a rational television station operator cannot be expected to undertake -- and most assuredly cannot sustain -- the costs necessary to convert an underdeveloped station into a meaningful contributor to diversity in its local market.

USA Broadcasting has brought to the video marketplace an exciting vision for a revitalized and uniquely responsive local broadcast service -- consistent with the fundamental diversity objective of the Duopoly Rule. The "CityVision" concept was launched in June 1998 on WAMI-TV, in the Miami-Ft. Lauderdale market, which -- like most of the stations owned and operated by USA Broadcasting -- had minimal infrastructure and previously had been airing televised shopping programming. The CityVision concept as introduced on WAMI provides for a substantial amount of high quality, locally produced news, public affairs and entertainment programming, that (a) is specifically directed to the needs, interests and concerns of a diverse local community and (b) creates significant local employment opportunities, including opportunities for minorities and women that are diminishing in the local television marketplace.

But vision and reality have collided in Miami. Based on its experience to date in connection with the launch of CityVision on WAMI, USA Broadcasting has concluded that the enormous costs of building a strong, responsive *local* broadcast presence like WAMI at its launch are unsustainable given the current economics of the broadcast television marketplace -- particularly as distorted by the Duopoly Rule. As USA Broadcasting previously has demonstrated, and as the record in these proceedings makes clear, the Duopoly Rule exacerbates the problems facing underdeveloped stations as they try to respond to intense and growing competition from proliferating cable program networks and other sources, which continue to drain audience and advertising revenue from over-the-air stations; and as they try to wrestle with increased programming costs, especially the costs of original local production. As a result, USA Broadcasting has been compelled to reduce its schedule of locally-produced programming at WAMI, and to scale back its plans for locally originated programming as it rolls out its CityVision concept in other markets.

In its previous submissions, USA Broadcasting has described WAMI's programming in detail, and has demonstrated the sorts of cost savings and operating efficiencies that could be realized through a flexible regulatory scheme that permits weak station/strong station combinations, resulting in more and higher quality locally-produced programming responsive to unique local needs, interests and concerns. *See* Letter from Barry Diller to William E. Kennard, dated February 11, 1999 (Attachment A hereto). These efficiencies and savings can be captured only by stations serving the same DMA market. Consequently, as long as the Duopoly Rule continues to prohibit ownership combinations involving weak and strong stations in the same market, it will remain a powerful disincentive to WAMI and USA Broadcasting's other undeveloped UHF stations, and other weak television "sticks," to become meaningful contributors to local broadcast diversity. It is therefore imperative that the Commission act promptly to modify a rule that is actually impeding the development of new local outlets offering diverse programming. What is at stake could very well be no more, and no less, than the future of localism in the video marketplace. A limited exemption from the Duopoly Rule that would allow weak station/strong station combinations would facilitate the relationships needed to create new local voices like WAMI and to ensure that vibrant, responsive, diverse local programming can be preserved and expanded.

An audience/revenue share figure in the 6-percent range represents the minimum benchmark that would be appropriate for such an exemption and is based on USA Broadcasting's experience to date, and its forward-looking financial projections, in connection with the launch of CityVision on WAMI. USA Broadcasting's analysis of WAMI's operating results over its first roughly six months of operation graphically illustrates the dilemma facing a broadcaster wishing to convert an underdeveloped station into a meaningful contributor to local diversity in its community. ***Simply stated, a station making the sort of commitment to localism and diversity embodied in USA Broadcasting's CityVision concept cannot expect to reach an operating break-even position until it achieves an audience/revenue share level of approximately 6 percent and cannot expect to recover its capital investment.***

The numbers speak for themselves. In a top-50 market such as Miami (and the other markets in which CityVision outlets are planned), a station producing and airing even a relatively modest amount -- relative to its total broadcast schedule -- of locally-produced news, public affairs and entertainment programming would not be expected to generate positive broadcast cash flow at less than an approximately 6 percent share of total market audience and revenue. USA

Broadcasting's analysis of WAMI's revenue and operating costs is attached hereto and summarized in the following table (dollar figures are in millions): */

	1%	2%	3%	4%	5%	6%
Total Market Revenue -- Miami	$487.1	$487.1	$487.1	$487.1	$487.1	$487.1
Station Revenue (net of commissions)	$4.1	$8.3	$12.421	$16.6	$20.7	$24.8
Station Operating Expenses (including local programming expenses)	$23.1	$23.1	$23.1	$23.1	$23.1	$23.1
Broadcast Cash Flow	($18.9)	($14.8)	($10.6)	($6.5)	($2.3)	$1.8

This summary does not include the substantial capital expenditures required for the conversion of primitive UHF stations into full-service production facilities in their markets. As USA Broadcasting has described in its previous submissions, capital costs associated with the conversions of WAMI's facilities from a passive, televised shopping repeater to a full-service station with local production capabilities were in excess of $13 million, of which more than $3 million were allocated to news production facilities and equipment. When these costs are taken into account, total operating cash flow remains substantially negative even at the 6-percent share level. It should be noted, moreover, that the capital expenditures described in Attachment B do not include the substantial costs of conversion to digital broadcasting. Indeed, another unintended consequence of the Duopoly Rule is that it deters weak stations from undertaking an early conversion to digital broadcasting.

*/ The figures summarized below and detailed in Attachment B do not include the non-recurring costs associated with sports programming. To the extent total available market revenue is greater in larger markets (Miami is the 16th DMA market), USA Broadcasting's analysis indicates that operating expenses can be expected to be proportionately higher, resulting in roughly comparable operating results.

Commission precedent establishes that an audience share benchmark is an appropriate basis for a regulatory classification. For example, in evaluating ADI modification requests, the Commission considers, among other factors, the station's share of total viewing in the cable community which it seeks to include in its ADI. *See, e.g., Channel 28 Licensee, Inc.*, 11 FCC Rcd 6050 (CSB 1996); *Montgomery Cablevision, L.P.*, 10 FCC Rcd 2732 (CSB 1995). Significantly in this respect, the Commission has acknowledged that stations with a viewing share of less than 5 percent do not make a significant contribution to local diversity. Thus, the Commission has concluded that a 5-percent share of over-the-air viewing reveals a sufficient "nexus between [a] station and its viewers" -- *i.e.*, a substantial enough market presence -- to justify treating the station as "local" for purposes of expanding its rights to cable carriage, but that a viewership share of 3 percent in a community is "not particularly significant" and therefore does not justify inclusion of the community within the station's ADI. *Channel 28 Licensee, Inc.*, 11 FCC Rcd at 6059-60.

Similarly, in the early 1970s, the Commission adopted its "significantly viewed" audience benchmarks as a way of drawing a line between out-of-market stations that have sufficient viewership to be considered "local" for purposes of entitlement to mandatory cable carriage and those that do not. *See Cable Television Report and Order*, 36 F.C.C.2d 143, 174-76 (1972). Recognizing that share of viewing was a reasonable surrogate for meaningful market presence, the Commission concluded that a station accounting for less than a specified share of total viewing should not be deemed to be a participant in a local market -- *i.e.*, it did not contribute materially to local diversity and competition -- and therefore would not be entitled to must-carry status there.

The financial analysis submitted with this letter illustrates the vicious circle posed by the Duopoly Rule. In today's highly competitive video marketplace, a broadcast business built on a foundation of responsive, locally produced programming is difficult to sustain even at share levels above 6 percent. Meanwhile, as USA Broadcasting previously has demonstrated, the stations that would be eligible for the proposed exemption currently are contributing little, if anything, to localism, diversity, opportunity and competition in their markets -- and may never be able to do so in the face of continued substantial erosion of broadcast viewing shares by cable, direct-to-home satellite programming and other media. *See Channel 28 Licensee, Inc., supra.*

The record in this proceeding contains evidence that justifies the outright repeal of the Duopoly Rule. This submission demonstrates that, at a bare minimum, the FCC *must* exempt stations with less than at least a 6-percent audience or revenue share. Clearly, a rule whose stated purpose is to enhance diversity is arbitrary and irrational, and cannot be justified, if it prohibits precisely the sorts of relationships that would give these underdeveloped stations access to the resources necessary to produce and air significant amounts of diverse local and other public interest programming and thereby to create meaningful new voices in the local video marketplace.

The Commission itself has recognized that an exception to the Duopoly Rule may be "consistent with the objectives of [the] rule, to foster diversity and economic competition." *Review of the Commission's Regulations Governing Television Broadcasting, Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 21655, 21680 (1996) (citing *Paramount Group of Philadelphia*, 10 FCC Rcd 10963, 10967 (1995)). In this connection, the Commission has found that common ownership that results in more or higher quality local or informational programming actually enhances diversity. *See, e.g., Paramount Group*, 10 FCC Rcd at 10967. *Cf. Hobart C. Johnson Television, Inc.*, 2 FCC Rcd 194, 195 (1987) (granting one-to-a-market waiver where common ownership would enhance television station's local programming). Indeed, precisely because "diversity of ownership *per se* is not an end in itself" but "*simply . . . a means to achieve the public interest goal of promoting diversity of viewpoints*," *Second Report and Order, Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1741, 1743 (1989) (emphasis added), the exemption proposed by USA Broadcasting would promote diversity in a manner consistent with the objectives of the Duopoly Rule and with Commission precedent.

Of course, in order for the exemption to function as a meaningful incentive for the production of local programming and to promote diversity and competition, it must remain in effect even in the event the underdeveloped station eventually begins to generate audience or revenue shares in excess of the benchmark. No station would shoulder the enormous risks of developing a new local outlet unless it could continue to receive the hoped-for economic returns after the newly developed station started to build a meaningful audience.

Based on the record established in this proceeding, as supplemented by the attached data, we respectfully submit that the Commission can no longer lawfully justify its duopoly prohibition absent at least a weak station/strong station exemption such as the limited exception proposed by USA Broadcasting. A benchmark of at least 6 percent is a sensible, reasonable way -- reflecting marketplace realities and consistent with prior Commission practice and precedent

-- to identify stations that do not make a meaningful contribution to competition, diversity, localism and opportunity in their markets, and that therefore should be eligible for such an exemption. The current application of the rule stifles diversity and localism. The limited exemption proposed by USA Broadcasting, on the other hand, would promote the policy objectives of the Duopoly Rule without any adverse effect on the public interest.

Respectfully submitted,

Hogan & Hartson L.L.P.

By:
William S. Reyner, Jr.
Mace J. Rosenstein

Attorneys for USA Broadcasting, Inc.

Enclosures

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Attached Distribution List

The Secretary, FCC
(for inclusion in MM Docket Nos. 91-211;
87-8; 94-150; 92-51; 87-154, 94-149; and 91-140)

Kathryn C. Brown
Susan Fox
Mary Beth Murphy
Anita Wallgren
Helgi C. Walker
Jane E. Mago
Rick Chessen
Roy J. Stewart
Robert H. Ratcliffe
Charles W. Logan

ATTACHMENT A

USA
NETWORKS
INC

BARRY DILLER
Chairman and
Chief Executive Officer

February 11, 1999

BY HAND DELIVERY

The Honorable William E. Kennard
Chairman
Federal Communications Commission
Washington, D.C. 20554

Dear Chairman Kennard:

I write to urge you again to relax the duopoly rule. Based on USA Broadcasting's experience converting a home-shopping station in the Miami-Ft. Lauderdale market to a full-service local programming outlet, I am convinced that the duopoly rule as now applied needlessly obstructs localism, diversity and competition, and that even modest duopoly relief would significantly promote those important public interest objectives.

As you know, in 1996 I announced a plan to convert the twelve undeveloped UHF home-shopping stations owned by USA Broadcasting (then Silver King Communications) into fully programmed, free television outlets, with significant amounts of local programming serving the stations' diverse local communities. We sometimes call this "CityVision," and we want to bring this new service to each of our communities, which include 7 of the largest 10 and 12 of the largest 22 markets.

In June 1998 USA Broadcasting converted the first of its stations: WAMI, Channel 69, in the Miami-Ft. Lauderdale market. WAMI not only brought new competition to its market, it launched with a greater commitment to localism, broadcast diversity, and employment opportunity than any station in my memory.

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The station launched with over 40 hours per week of original locally produced programming, which included the following:

- *The Times.* A nightly news show that emphasizes issues of local importance and that resists the "if-it-bleeds-it-leads" approach, *The Times* covered just one murder in its first seven months.

- *Generation ñ.* Focusing on issues uniquely of concern to the local Latino community, this program is a rare example of an English language show about this community.

- *City Desk.* Produced in collaboration with the *Miami Herald*, this program follows newspaper reporters as they investigate stories of local interest.

- *Out Loud.* A talk show devoted to local public affairs, social and cultural issues, this program received a desirable time slot nightly after *The Times*.

- *WAMI on Miami.* Seven hours per week of live, locally-produced, family friendly and educational children's programming, *WAMI on Miami* at launch was in addition to the almost four hours per week of more familiar educational programming for children.

- *Traffic Jams.* An informative morning traffic and weather program, *Traffic Jams* was designed as a significant aid to commuters.

- *Election Times.* In the weeks before the November 1998, general election, WAMI offered free political airtime not just to candidates for major offices, but to any local candidate.

More than 200 employees were hired locally for WAMI's staff and for the new local shows it aired. This group was the most diverse I have seen in the television business. More than half were minorities, many given their first opportunity to work in the television business, and others who played key roles in station management and in the development and production of our local programming. The WAMI team produced, and continues to produce, a unique and first-rate product. After just weeks on the air, WAMI was nominated for twelve regional Emmys and won seven.

I would like to replicate WAMI's launch in our other markets and, indeed, expand the amount of original local programming all of our stations would create and broadcast. This would plainly further the bedrock objectives of free local television. Unfortunately, outdated FCC ownership rules are steering us away from those objectives. In Miami, I regret to report that we have been forced to cease original production of *Generation ñ*, *City Desk* and *Out Loud*, after reluctantly concluding that, restrained by current FCC rules, we could not sustain costly local production of those programs. And we are now planning for launches in other markets with program schedules that contain fewer hours of original, locally produced programming than we attempted in launching WAMI.

To understand why, consider the perspective from the marketplace, as shaped by current FCC rules, of a television station seeking to provide significant amounts of original local programming -- especially where that station is an undeveloped, low-share "stick." Prior to June 1998, WYHS (as WAMI was called before its call letters changed) had an extremely modest technical infrastructure, just four employees, and an annual budget in the hundreds of thousands of dollars. This is typical of low-share UHF stations. To convert the station, we invested tens of millions of dollars in capital and operating expenses. That level of investment is necessary to develop a full-service facility suitable for significant local production and a local news operation, and actually to produce WAMI's 40-plus hours of original local programming.

Local programs, however, can generally generate revenue only from a single market, as compared to a program produced in Hollywood and distributed nationally, which can generate revenue across all 211 of the country's TV markets. At the same time, because advertisers generally prefer established programming to new, untested product, a new local program on a low-share UHF station is unlikely to lure advertisers away from other, stronger stations with more familiar shows. These problems are aggravated by the unique burdens that UHF stations face, including channel-position and power issues.

Meanwhile, over the last decade there has been an explosion of competition from other entertainment and information sources that continues to drain viewers and revenue from free, local television. Under the circumstances, it is easy to understand the powerful incentive for marginal stations to function as passive repeaters of national programming, including paid programming or ancient syndicated product, rather than attempt to make more significant contributions to their local communities. The ultimate result for the public: a steady erosion of the ability of our free over-the-air television system to truly serve the purposes of localism, diversity, opportunity and competition.

The FCC's ownership rules have not only failed to prevent that erosion; they have contributed to it. While broadcasting's main competitor, cable, can support its programming through a second revenue stream and can spread its costs of programming over multiple commonly owned channels, broadcasting can do neither. I am not arguing that broadcasters should begin charging subscription fees. But if the FCC wants to preserve our only *free* and *local* video programming service, it is well beyond time that the FCC stop forbidding broadcasters from taking advantage of the efficiencies of common local ownership.

From our experience, it is clear that common ownership and other now-forbidden business arrangements would allow us and other broadcasters to produce far more high quality, innovative, original local and public interest programming than is economically rational under current FCC rules. Integration of two stations' operations, for example, would permit substantial savings in capital outlays through the sharing of production facilities and equipment, vehicles, computers and other items. Much of the huge capital outlay associated with construction of WAMI's local production facilities could have been eliminated had we been able to utilize the capital plant of a stronger, commonly owned station, and similar cost savings could have been realized through the integration of administrative, sales, talent and other personnel. At the same time, pairing with a stronger station would provide a tremendously important promotional and sales platform for the new and untested local programming that is offered by a station like WAMI. Our analysis indicates that, overall, combination or other now-forbidden business arrangements with another, stronger station in Miami could have resulted in capital and operating cost savings on an order of magnitude approaching 50 percent -- savings which could be allocated to the production and promotion of more high quality local programming, which could reduce the amount of advertising revenue needed to break even or show a profit, and which could allow unknown local programs to be given more time on the air to demonstrate their viability. Based on our experience, these savings and associated public interest benefits can be obtained by marginal stations only pursuant to transactions that are now forbidden by FCC rules because, unless stronger broadcasters can obtain what is now defined as an attributable interest, they are disinclined to help a new entrant become a competitor.

As a way to ameliorate this situation, USA has proposed an exemption from the duopoly rule that would permit the common ownership of attributable interests in two television stations in the top-50 DMA markets where at least one of the stations has less than a 5 percent audience share. The stations eligible for such a presumptive exemption, by definition, are contributing very little, if anything, to diversity in their markets. And given the economic reality such stations face in today's television marketplace, they cannot be expected to provide significant amounts of local or other public interest programming in the future. An undeveloped station exemption, however, would dramatically increase the likelihood that such stations would contribute to localism, diversity, opportunity and competition. Certainly as applied to marginal stations, relaxation must be seen as having a diversity-enhancing effect.

In connection with adoption of such an exemption, we would strongly urge the Commission not to implement a "remaining voices" test. Such a test is likely to foreclose in all but a handful of markets the very combinations it would theoretically make possible. A "remaining voices" test, moreover, is unnecessary in combination with a duopoly exemption for low-share stations since such stations do not now and, given powerful industry trends, can't be expected to make meaningful contributions to localism or diversity in their markets.

I recognize that the Commission has historically relied on its structural ownership restrictions as a partial surrogate for enforcement of broadcasters' public interest programming obligations. But the ownership rules are deterring and diminishing the provision of public interest programming. I recently served on the President's Advisory Committee on the Public Interest Obligations of Digital Broadcasters, whose report rightly reaffirmed the public interest duties of free television broadcasting as it enters the digital era. But the government cannot continue to ask broadcasters to provide significant amounts of public interest programming while simultaneously forbidding them from doing so in an economically feasible way.

I recognize as well that the Commission has relied on its ownership rules to promote increased ownership of television stations by minorities and women but that recent court decisions have invalidated some of those measures. Like you, I would like to see new ideas and initiatives that result in increased diversity in the ranks of broadcast owners. But as we pursue that goal, I implore you to seize the opportunity to correct the ways in which FCC local ownership rules are frustrating the closely related goals of diversity of programming and increased employment opportunity.

I urge you and your colleagues to resolve the pending ownership proceeding in a manner that recognizes the realities of today's television marketplace, the huge entry barriers that confront an undeveloped station with no meaningful market share, and the ways in which FCC rules are compounding the difficulties and discouraging localism and other public interest objectives. If the Commission's objective is to promote a vital free and local broadcast service that is responsive to local viewers' needs, interests and concerns, then its regulatory scheme must stop providing disincentives for broadcasters to develop, produce and air truly local shows and other programming that serves the public interest. USA believes -- based on hard experience, not just theory -- that the efficiencies that can result from common ownership of local television stations and from other now-forbidden local business arrangements would create powerful incentives to produce significant amounts of original local programming and otherwise promote the public interest. Relaxation of the duopoly restriction along the lines that we have proposed, in a manner that would apply equally and fairly to all broadcasters on a going forward basis, would not diminish localism, diversity, opportunity and competition. Relaxation, indeed, is necessary to promote those objectives.

Sincerely,

Barry Diller

CC: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Distribution list

cc: Kathryn C. Brown
Susan Fox
Mary Beth Murphy
Anita Wallgren
Helgi C. Walker
Jane E. Mago
Rick Chessen
Roy J. Stewart
Renee Licht
Robert H. Ratcliffe
Charles W. Logan
Secretary, FCC

ATTACHMENT B

Miami
1% - 6% Market Share

	1%	2%	3%	4%	5%	6%
Market TV Broadcast Ad Revenue	***487,100,000***	***487,100,000***	***487,100,000***	***487,100,000***	***487,100,000***	***487,100,000***
Market Share	***1.00%***	***2.00%***	***3.00%***	***4.00%***	***5.00%***	***6.00%***
Station Revenue						
Total Gross Revenue	**4,871,000**	**9,742,000**	**14,613,000**	**19,484,000**	**24,355,000**	**29,226,000**
Commissions	(730,650)	(1,461,300)	(2,191,950)	(2,922,600)	(3,653,250)	(4,383,900)
Revenue, Net	**4,140,350**	**8,280,700**	**12,421,050**	**16,561,400**	**20,701,750**	**24,842,100**
Station Operating Expenses	23,057,054	23,057,054	23,057,054	23,057,054	23,057,054	23,057,054
*Local Programming Operating Expenses */*	*11,120,073*	*11,120,073*	*11,120,073*	*11,120,073*	*11,120,073*	*11,120,073*
Broadcast Cash Flow	**(18,916,704)**	**(14,776,354)**	**(10,636,004)**	**(6,495,654)**	**(2,355,304)**	**1,785,046**
Capital Expenditures †/	**(13,631,674)**	**(13,631,674)**	**(13,631,674)**	**(13,631,674)**	**(13,631,674)**	**(13,631,674)**
*Local Programming Capital Expenditures */*	*(4,771,085)*	*(4,771,085)*	*(4,771,085)*	*(4,771,085)*	*(4,771,085)*	*(4,771,085)*
Total Operating Cash Flow	**(32,548,378)**	**(28,408,028)**	**(24,267,678)**	**(20,127,328)**	**(15,986,978)**	**(11,846,628)**

*/ Local Programming Operating Expenses and Capital Expenditures represent costs associated with WAMI's locally producing programming, including the following shows: "The Times," "Generation ñ," "Out Loud," "City Desk," "WAMI on Miami," "Traffic Jams" and "Election Times."

†/ Excludes costs associated with DTV conversion.

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